INTERNATIONAL ARBITRATION AND THE RULE OF LAW

ESSAYS IN HONOUR OF FALI NARIMAN

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Parallel Proceedings in Investment Arbitration: Causes, Problems and Possible Solutions

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I. INTRODUCTION

This essay explores the unresolved question of parallel proceedings in investment treaty arbitration. This question brings into focus one of the ongoing 'fault lines' with the current system for the settlement of investment treaty disputes. It raises theoretical questions of consent and (in recent jurisprudence) good faith, but also nuts-and-bolts practical questions about how to grapple procedurally with parallel proceedings.

A focus on systemic issues in investment arbitration seems a fitting tribute to Fali Nariman. Fali has sat as arbitrator on multiple investment tribunals, has been a towering figure in the development of international arbitration in India and beyond, and is gifted with a keen eye for a holistic view of the law. His witty and eminently down-to-earth 2011 speech on the 'Ten Steps to Salvage Arbitration in India'[1] is a fine example of this. There are of course many others.

The area of parallel proceedings is undoubtedly not peculiar to investment arbitration. It has been a longstanding quandary in commercial arbitration, attracting a great deal of commentary and attention over the years as numerous commentators, arbitral institutions and lawmakers have struggled to come to grips with notoriously difficult questions of consolidation and joinder. But it is brought into higher relief by the deeper systemic questions which exist in the investment arbitration field.

One of the most ambitious attempts to regulate the area of parallel proceedings may be found in the New Zealand Arbitration Act of 1996. An entire Section of this Act is devoted to, and entitled, 'Consolidation of Arbitral Proceedings'.[2] This pioneering Section has served as inspiration for the more recent

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1 Fali S Nariman, 'Ten Steps to Salvage Arbitration in India: The First LCIA-India Arbitration Lecture' (2011) 27 No 2 Arb Intl 115.

2 Section 2 of Schedule 2 of the New Zealand Arbitration Act. The 2007 and 2019 amendments to this Act have left Section 2 unaltered.

Mauritian International Arbitration Act of 2008. The official commentary to this Act records that this 'is a very difficult area of arbitration law'.[3]

These difficulties are further compounded in the field of investment arbitration for three reasons.

First, there is the longstanding issue about the interaction between contract and treaty claims. In particular, the knotty question about the effects of umbrella clauses on forum selection clauses in investment contracts. This is best illustrated by the famously divergent decisions in *SGS v Pakistan* and *SGS v Phillipines*.[4] Nothing further will be added on this specific legal issue, as it would warrant a separate essay. The important point to bear in mind for purposes of the present essay is that this remains a wellspring of parallel proceedings.

Second, the problem of so-called 'vertical claims' has gained increasing attention over the past few years. This concerns a situation where multiple legally distinct investors linked by the same vertical corporate chain—e.g. parent company and subsidiary, or company and shareholders—pursue parallel claims against the same host State for the same harm arising out of the same measure—under the same or different treaties. In this way, the investor has multiple bites at the cherry. Whilst this is technically possible, this—it is now being argued—may constitute an abuse of the system of treaty protection. That argument has been accepted in one decision to date, *Orascom v Algeria*, a decision which may provide a basis for dealing with such cases going forward.[5]

Third, even if there is no such 'abuse' of the system, it may be necessary to coordinate parallel claims. Multiple investors with no link of ownership may pursue claims against the same host State for the same grievance arising out of the same measure. Spain and the Czech Republic, for instance, have found themselves on the receiving end of dozens of claims as a result of changes to the subsidy regime in the solar energy sector. This not only puts a strain on host States, but also creates

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3 *Travaux Préparatoires* to the 2008 Mauritian International Arbitration Act [159].

4 *Société Générale de Surveillance v Islamic Republic of Pakistan* ICSID Case No ARB/01/13 Decision on Objections to Jurisdiction (6 August 2003); *Société Générale de Surveillance v Republic of the Philippines* ICSID Case No ARB/02/6 Decision on Objections to Jurisdiction (29 January 2004).

5 The question whether multiple 'vertical claims' by the same chain of investors constitutes an impermissible abuse of rights was the subject of a colloquium organised by Gabrielle Kaufmann-Kohler and Emmanuel Gaillard in Paris on 22 November 2013. Notably, the organisers of this academic event were also protagonists in the *Orascom* case addressed in Section IV below.

a risk of inconsistent decisions. In this scenario, how may one ensure consistent outcomes? And how may the onus on host States be avoided or at least alleviated?

This essay is organised as follows. Section II defines the subject matter and identifies the issues of concern in this area. Section III focuses on what may be referred to as the 'traditional problem'—consolidation—in the specific context of investment arbitration. Section IV considers the distinction proposed by the *Orascom* decision between 'abusive' and 'good faith' proceedings. Lastly, Section V draws the essay to a close with some final remarks.

II. DEFINITION AND ISSUES

The first task at hand is to propose a working definition of the area under discussion and then to identify issues of concern, be they real or perceived.

As a working definition,[6] the question of parallel proceedings in investment arbitration refers to a scenario under which multiple investors—whether related or unrelated—pursue claims in different fora against the same host State for the same measure—whether actions or omissions. Where the investors are related, the claims are often for 'substantially the same relief'.[7] Where the investors are unrelated, the specific relief will usually vary for each investor, although the nature of the relief is likely to be the same. In both scenarios, the common denominator is (a) a multiplicity of claims; (b) brought in different fora; (c) against the same host State; (d) on the basis of the same measure or conduct.

This question was initially brought to the attention of the UNCITRAL Commission in July of 2013. At its forty-sixth session, the UNCITRAL Commission considered areas where further work in the field of investment arbitration would be desirable and merit further examination. The UNCITRAL Secretariat spent considerable time and resources looking into this question. As a result, the UNCITRAL website now contains a wealth of resources on this topic, including working papers prepared for the last four annual Commission sessions.

In general terms, as the UNCITRAL Secretariat has noted, parallel proceedings are perceived as being detrimental to investment arbitration, insofar as

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6 As some commentators have noted, '[t]here is no general definition of parallel proceedings'. Sae Youn Kim and Tae Joon Ahn, 'Investment Arbitration and Parallel Proceedings', in Barton Legum, *The Investment Treaty Arbitration Review* (Law Reviews 2018) 74.

7 United Nations Commission on International Trade Law (UNCITRAL), 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session' (6 November 2018) A/CN.9/964 [43].

they tend to erode public confidence in the system. Much of the criticism stems from the view that parallel proceedings are at odds with fundamental principles of good faith and procedural fairness in international dispute resolution. In particular, the following four complaints have been levelled against the practice of parallel proceedings.

First, it leads to unnecessary costs and to a waste of resources—in particular, public resources. When parallel proceedings are brought, a host State bears the onus of having to defend against several claims relating to the same measure—or wrongful conduct—in different fora, some for substantially the same relief if the investors are related.

Second, it gives rise to multiple-recovery issues: not just the possible risk of multiple recovery when the investors pursuing the claims are part of the same corporate structure and thus claim for the same or substantially the same damage, but also the legal uncertainty and extra costs—before arbitral tribunals and domestic courts—these issues generate.

Third, parallel proceedings carry the risk of inconsistent or contradictory decisions, including not just on the outcome but also on findings of fact. Whilst this risk is also present in commercial arbitration, the issue carries a different significance in investment arbitration. While commercial litigation will usually be of a 'one-off' nature, the State measures challenged in investment arbitrations will often affect multiple related or unrelated investors (as the example of the Spanish solar cases given above demonstrates) and thus give rise to parallel proceedings in relation to issues which will often be highly political in nature. While commercial parties that voluntarily opt for arbitration may have learnt to live with and accept the consequences of uncoordinated parallel proceedings arising from their commercial projects, in the investment field the involvement of States or State entities—and thus of public funds, the political nature of the measures challenged, and the greater publicity accorded to investment cases all coalesce to create an entirely different set of expectations from actors which range well beyond the relevant State and investors, to include the citizens of the relevant State and civil society.

Fourth, parallel proceedings may generally undermine confidence in the system of investment arbitration and, in particular, alienate host States—whose consent is the keystone upon which the system is built. This means that, from a policy standpoint, not just the existence but also the mere risk of parallel proceedings is to be avoided to ensure confidence in the system.

We now move to discuss the three substantive areas identified at the introduction of the essay, namely: consolidation, the management of parallel

proceedings in general, and the *Orascom* decision which deployed the concept of 'abuse of the system' to regulate parallel proceedings in a specific factual scenario.

III. CONSOLIDATION

The term 'consolidation' covers different situations. *Stricto sensu*, consolidation refers to the joinder of two or more claims already pending before different tribunals. In a broader and less accurate sense, the term 'consolidation' is sometimes also used to refer to the constitution of a single tribunal to hear, from the outset, multiple claims from different investors for the first time. In this broader sense, there is no real consolidation of claims before different tribunals, but rather an aggregation of claims before a single tribunal from the outset.[8] A distinction should thus be drawn between consolidation proper and aggregation of claims.

As is explained further below, the practice of *de facto* aggregation of claims pending determination of questions of (*inter alia*) consent by the appointed tribunal has taken root and is consistently used in the context of ICSID. The aggregation of claims can take one of two forms. The claims may be fully aggregated, resulting in the rendering of a single award (full aggregation). Or the claims may be simply heard concurrently, resulting in the rendering of separate awards (partial aggregation). Whether aggregation is full or partial, there is at all times, from the beginning, a single tribunal and a single proceeding—a key difference with consolidation proper.

The first investment treaty to have dealt with the question of consolidation in a systematic manner is the North American Free Trade Agreement (NAFTA).[9] Under Article 11-17(3) of NAFTA, consolidation is the default rule in the event of multiple claims from related investors—claims 'arising out of the same events […]

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8 Sometimes the aggregation-of-claims scenario is referred to as 'mass claims'. For instance, in relation to the matter in *Abaclat and Others v The Argentine Republic* ICSID Case No ARB/07/5. But the term 'mass claims' would not be accurate to describe, for instance, a situation where the claims of just two or three investors are submitted—or aggregated—before a single tribunal. A preferable alternative term for aggregation of claims would be *de facto* consolidation.

9 The United States-Mexico-Canada Agreement, the so-called 'new NAFTA' or 'NAFTA 2.0', entered into force on 1 July 2020, replacing the original NAFTA. However, on the question of consolidation addressed in this essay, the original and the new NAFTA are essentially the same. Under both treaties consolidation is warranted when there is a 'question of law or fact in common'. The United States-Mexico-Canada Agreement further specifies that the consolidated claims must 'arise out of the same events or circumstances' (Article 14.D.12), which appears intended to be a codification of the NAFTA case law on matters of consolidation.

should be heard together by' the same tribunal.[10] NAFTA is thus a pioneering investment treaty in this area.

Article 11-26 of NAFTA is the focal provision on consolidation. This provision is instructive for two reasons. First, because it is an archetypal example of a consolidation provision in an investment treaty, with the rare benefit of some interpreting case law, in the form of the decisions in *Corn Products*[11] and *Canfor*.[12] Second, because it provides a useful model on how a consolidation provision should operate in practice—whether in an investment treaty, in institutional rules or in national laws. Specifically, Article 11-26 NAFTA helpfully illustrates the two prerequisites of any sound consolidation provision.

First, it must record the disputing parties' consent to consolidation *ex ante*—before a dispute actually arises. This *ex ante* consent obviates the need for *ex post* consent to consolidation at a time when tactical or other considerations may mean it will not be forthcoming. Thus, as part of the NAFTA arbitration regime, Article 11-26 provides that a disputing party has the right to request consolidation with other NAFTA claims 'that have a question of law or fact in common'. A party contracting into the NAFTA regime accordingly expressly accepts the risk, *ex ante*, that consolidation may be ordered against its post-dispute wishes.

Second, it must provide for a workable mechanism by which consolidation may be brought to fruition even in the face of opposition to it. In the case of NAFTA, Article 11-26 makes this possible through the creation of a 'super tribunal'—an expression which is not found in NAFTA, but which has been used by commentators[13]—in charge of hearing the consolidation request and with the power *inter alia* to divest previously constituted tribunals of their jurisdiction, either

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10 The claims may be heard separately if the consolidation tribunal finds that consolidation would prejudice 'the interests of a disputing party'.

11 *Corn Products International, Inc. v United Mexican States* ICSID Case No ARB(AF)/04/1 Order of the Consolidation Tribunal (20 May 2005).

12 *Canfor Corporation v United States of America* (*Canfor*), arbitration under Article 26 of NAFTA, Order of the Consolidation Tribunal (7 September 2005).

13 The expression appears to have been originally coined by Jan Paulsson. See Walid Ben Hamida, *La Consolidation des Procédures Arbitrales*, in the *Gazette du Palais* of 14 December 2006 (*Investissements internationaux et arbitrage*) 30, 32, footnote 34, referring to J Paulsson, 'Arbitration without Privity' (1995) 2 ICSID Rev 248.

partially or completely,[14] and to stay the proceedings of previously constituted tribunals pending its decision on the consolidation request.[15]

Those dual prerequisites of (A) consent and of (B) a workable consolidation mechanism shall be briefly addressed before turning to the question of (C) the factors relevant to decide the question whether to consolidate when a power to consolidate otherwise exists.

A. Consent

On the first prerequisite, there has been a debate as to whether the tribunal's 'general powers' provisions under various institutional rules—such as Article 44 of the ICSID Convention or Article 17 of the 2013 UNCITRAL Rules—subsume the power to order consolidation, or aggregation of claims, in the absence of *ex post* agreement by all disputing parties. The general consensus appears to be that it does not:[16] these general provisions are meant to enable tribunals to fill procedural voids, and do not evince consent to consolidation from the disputing parties.

Furthermore, even assuming *arguendo* that these 'general powers' do subsume the power to order consolidation, this would not take one very far in most cases. If, for instance, two tribunals have already been formed, which tribunal should use that power? What if both use it? The 'general powers' provisions do not answer these questions.

The question of the requirement for consent to consolidation was helpfully considered by the tribunal in *CPC v Cambodia*. The tribunal in that case made the following remarks:[17]

> [First], the uncontroversial starting point is that the consolidation of claims in ICSID arbitration (as with most other systems) depends upon the consent of the

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14 NAFTA, art 1126(2) and (8).

15 NAFTA, art 1126(9).

16 'Neither English law nor the law in force in most other jurisdictions provides an arbitral tribunal or the Court with a general power to ensure that, in a multi-party situation, two or more arbitrations will be considered by the same tribunal either at the same hearing or at immediately succeeding hearings to avoid the danger of inconsistent awards'. Chartered Institute of Arbitrators, Practice Guideline 15: Guidelines for Arbitrators on how to approach issues relating to Multi-Party Arbitrations [1.3].

17 *Cambodia Power Company v Kingdom of Cambodia & Electricité du Cambodge* (*CPC*) ICSID Case No ARB/09/18 Decision on Jurisdiction (22 March 2011) [121]–[123], [126]–[128].

> parties. Such consent may be established before or after the dispute has arisen. Absent consent, the fundamental principle of party autonomy dictates that claims under multiple contracts may not be consolidated, however inconvenient and inefficient that result may be.
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> [Secondly], whilst such consent usually takes the form of an express provision, whether in a contract or Treaty; by way of incorporated arbitration rules; or in a submission agreement; it can also be implied from the circumstances.
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> [Thirdly, the relevant decisions] emphasise the need to interpret the parties' intentions in light of all the circumstances of each case. [Thus], in *Noble Energy v Ecuador*, the tribunal's conclusion that it had jurisdiction over disputes arising out of multiple agreements was premised upon 'an implied consent to have the pending disputes arising from the same overall economic transaction resolved in one and the same arbitration, such implied consent having been deduced from a number of factors related to the purpose and configuration of the agreements in question'.[18]
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> [Fourthly, and importantly], establishing requisite consent entails [...] a further level of analysis, namely identifying the precise mechanism by which it has been agreed that claims be coordinated [...] parties may agree that disputes arising out of multiple contracts are all to be brought within the scope of one particular arbitration agreement in one of the contracts. Alternatively, separate arbitration clauses in separate agreements might be interpreted as, in truth, one single arbitration agreement. Further still, claims under multiple contracts might be merged into one arbitration proceeding, and determined by way of one award. Alternatively, separate arbitration proceedings arising out of separate arbitration agreements might be heard and determined concurrently (i.e. synchronised), whilst maintaining a separate juridical nature. Whilst all of these variations might be described as 'consolidation', each is obviously different in nature.

There is an important qualification to the *CPC* tribunal's statements of principle: while an ICSID case, this was a case where the claims were being brought pursuant to contractual agreements containing ICSID arbitration clauses, not under investment treaties. Similarly, in *Noble Energy* the tribunal was dealing with two contractual agreements containing ICSID clauses, but also—in that case—with a claim under the US-Ecuador BIT. The question accordingly arises of how the issue should or would be tackled in a situation such as the *Antaris v Czech Republic* case

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[18] *Noble Energy, Inc. and MachalaPower Cia. Ltda. v The Republic of Ecuador and Consejo Nacional de Elecricidad* (*Noble Energy*) ICSID Case No ARB/05/12 Decision on Jurisdiction (5 March 2008) [194]. The quote in italics is a quote from *Noble Energy* on which the *CPC* tribunal relied (at [86] and [124]).

(*Antaris*)[19] (considered further below), where the issue is one of intention to consolidate claims under a number of different investment treaties.

Can the reasoning in the *CPC* and *Noble Energy* cases be transposed to the treaty interpretation arena from that of contractual interpretation? Could it be said that a State's consent to arbitration under a network of bilateral or multilateral investment treaties which between them cover the separate economic interests of the relevant shareholders evinces an implied intention to accept consolidated—or aggregated—claims? Does the issue simply not arise where aggregation—or *de facto* consolidation—has occurred under multiple investment treaties as opposed to multiple contracts, and if not, why not?

These issues are of course not straightforward, and a clear mechanism for *ex ante* consolidation—including *ex ante* consent—would certainly be preferable to reliance on implied consent. But, as we have seen, such mechanisms are rare so far, and we accordingly briefly consider these difficult questions below, by reference to the only publicly available decision from an investment tribunal which tackled the question of implied consent to aggregation of claims based on more than one treaty.

In *Guaracachi America Inc. (GAI) and Rurelec PLC v Bolivia* (*Rurelec*),[20] two companies—one American, the other British—began arbitration proceedings against Bolivia for the alleged uncompensated nationalisation of a 50.001% stake in Empresa Eléctrica Guaracachi S.A. (EGSA), an electricity company incorporated under the laws of Bolivia. A Bolivian State-owned entity held the remaining shares in EGSA. GAI directly owned the 50.001% shares in EGSA; Rurelec, as GAI's parent company, indirectly owned these same shares.[21] Both brought treaty claims against Bolivia in a single arbitration before the same tribunal: GAI, on the basis of the US-Bolivia BIT; Rurelec, on the basis of the UK-Bolivia BIT. Bolivia objected to this setup alleging it had not consented to join 'claims arising under different BITs into a single arbitration proceeding before a single tribunal'.[22]

The *Rurelec* tribunal dismissed Bolivia's objection to jurisdiction for the following two main reasons. First, it noted that Bolivia's consent to arbitration, in

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19 *Antaris GmbH and Dr Michael Göde v The Czech Republic* PCA Case No 2014-01 Award (2 May 2018) [16].

20 *Guaracachi America Inc. & Rurelec PLC v The Plurinational State of Bolivia* PCA Case No 2011-17 Award (31 January 2014).

21 *Rurelec* (n 20) [125], Figure 2.

22 ibid [164].

either BIT, was 'not subject to any condition or limitation' in scope.[23] Silence, in this context, 'play[ed] against the Respondent's' position, 'since one cannot use silence to limit the scope of the consent given'.[24] Thus, the tribunal reasoned, nothing in the BIT's offers of arbitration barred the claimants 'from submitting a single, joint arbitration case against the Respondent'.[25] Second, the claims were 'identical and overlapping':[26] the 'same alleged facts' and the 'same alleged breaches'.[27] In a nutshell, 'the same dispute'—only based on 'two different BITs'.[28]

If that decision is to be followed, the following three factors can be identified as relevant to the question whether a respondent has impliedly consented to the aggregation of claims based on more than one investment treaty:

- Scope of consent: The arbitration offers in the underlying BITs should be broadly worded and should not contain any limitations or restrictions on the possibility of hearing multiple claims in a single arbitration. If a BIT's arbitration offer is narrowly worded or includes any such restrictions, claims based on that treaty may not be aggregated with claims arising under other treaties.

- Same dispute: Implied consent may be inferred when the multiple claims relate to what essentially is the same dispute. That is, a dispute based on the same facts and same State measures or conduct. A more difficult question arises as to whether the treaty protections or the damage alleged must also be the same. Whilst a finding that they are, would support the conclusion that it is the same dispute, a finding that they are not, may not *ipso facto* preclude that conclusion—within

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23 *Rurelec* (n 20) [336].

24 ibid [341]; to further bolster this conclusion, the *Rurelec* tribunal noted that no express consent to the aggregation of claims is required over and above consent to arbitration. Relying on the decision in *Ambiente Ufficio v Argentina*, the *Rurelec* tribunal adopted as its own this quote: '[I]t is evident that multi-party arbitration is a generally accepted practice in ICSID arbitration, and in the arbitral practice beyond that, and that the institution of multi-party proceedings therefore does not require any consent on the part of the respondent Government beyond the general requirements of consent to arbitration' (*Rurelec* (n 20) [343]). *Ambiente Ufficio S.p.A. v The Argentine Republic* ICSID Case No ARB/08/9 Decision on Jurisdiction and Admissibility (8 February 2013) [141].

25 *Rurelec* (n 20) [336].

26 ibid [338].

27 ibid [337].

28 ibid [338].

certain limits. In the end, this would appear to be more a matter of degree than of hard-and-fast rules.

- Same arbitration rules: Implied consent appears to be feasible only when the State has consented to the same set of arbitration rules. Difficulties as to both consent and the mechanics of consolidation (considered further below) are likely to arise where the allegedly related arbitrations are governed by different arbitration rules, say ICSID and UNCITRAL. While the *Rurelec* tribunal did not mention this factor, it is likely that it simply took it for granted, as the claims in that case were all based on the same version of the UNCITRAL Rules.[29]

We now turn to consider the question of the mechanics of how, in practice, multiple claims can be consolidated where consent otherwise exists to such consolidation.

B. A Workable Consolidation Mechanism

Whilst the question of consent has attracted far more attention in the literature, the question of how consolidation is to take place is just as important. Without a workable mechanism to consolidate claims, consent alone would not accomplish much. The procedural nuts-and-bolts of consolidation are the means to give effect to that consent.

Outside the NAFTA context explored above, the most efficient way to deal with questions of consolidation has so far been the aggregation of claims, fostered by ICSID's practice of encouraging disputing parties to agree to the appointment of the same tribunals to hear separate claims relating to the same measures. This solution requires the *ex post* consent of all disputing parties, to allow the two separate references to be heard by the same arbitral tribunal. Antonio Parra, former Secretary-General of ICSID, referred to this practice in his intervention at a Geneva Colloquium in 2006.[30] The examples are numerous. For instance:

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[29] The *Rurelec* tribunal did mention, however, that the arbitration offers in the underlying investment treaties must not be 'fundamental[ly] incompatib[le]', which may be understood to mean that the arbitration rules must be, if not the same, at least 'compatible' (*Rurelec* (n 20) [345]).

[30] Antonio R Parra, 'Desirability and Feasibility of Consolidation: Introductory Remarks', (2006) 21(2) ICSID Rev-FILJ 134.

- *Salini v Morocco* and *RFCC v Morocco*[31] are examples of two separate cases under the same BIT being heard by the same tribunal, thus avoiding the risk of inconsistent decisions.

- *Sempra v Argentina* and *Camuzzi v Argentina*[32] are examples of two separate cases under two different BITs being heard by the same tribunal.

There is another ICSID practice allowing for the aggregation of claims. Tellingly, this practice does not require the *ex post* consent of all disputing parties—seemingly an exception to the general rule that all disputing parties must consent. This is how Antonio Parra described this practice in the Geneva colloquium of 2006:[33]

> As several recent cases demonstrate, ICSID has been prepared to register single requests for arbitration lodged by multiple investors in respect of disputes arising out of the same events or circumstances in a host State. In some of the cases however, the claimants were investors in different projects in the same economic sector and/or were nationals of different countries and hence relied on different BITs. In all of these cases, a multiplicity of separate proceedings has thus been avoided, for the time being.

This ICSID practice of single registration for multiple claimants can be an effective tool for claimants with distinct economic interests—such as shareholders in the same vertical chain—to pursue their claims together if they so wish. But this practice calls for three remarks.

First, and most obviously, what if the claimants do not want to register their claims in a single request? This ICSID practice—without a concomitant mechanism which would allow claims to be consolidated even where the claimants with distinct economic interests do not wish to have their claims heard together—arguably places all the cards in the hands of the claimants. It is up to them to decide whether to bring the claims together or not; if not, there is no mechanism to bring

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31 *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco* ICSID Case No ARB/00/4; *Consortium R.F.C.C. v Kingdom of Morocco* ICSID Case No ARB/00/6.

32 *Sempra Energy International v The Argentine Republic* ICSID Case No ARB/02/16; and *Camuzzi International S.A. v The Argentine Republic* ICSID Case No ARB/03/2.

33 Parra (n 30).

the claims back together. This creates an imbalance of procedural arms to the detriment of host States.

Second, this practice works only under a system where it is possible to jointly register multiple claims and to constitute a single tribunal even in the face of opposition from a respondent host State—such as ICSID. But it would not work, for instance, under the UNCITRAL Rules, where the respondent State may as a matter of fact frustrate the constitution of a single tribunal. A striking example of this is the UNCITRAL case of *Antaris Solar GmbH et al v Czech Republic* filed in May 2013.[34]

In *Antaris*, it was publicly reported that a group of ten investors in the solar energy sector brought claims against the Czech Republic under the UNCITRAL Rules pursuant to various investment treaties, including the Energy Charter Treaty and the Czech BITs 'with the Netherlands, Germany, Cyprus, Luxembourg and the United Kingdom'.[35] However, the Czech Republic did not consent to the aggregation of claims under a single UNCITRAL matter, instead seemingly appointing a separate arbitrator for each claimant on the basis that these were separate claims under separate arbitration agreements.[36] Nor did the PCA step in to appoint a single arbitrator on behalf of the Czech Republic as it had 'actively participated'[37] in the proceedings. Predictably, the aggregation of claims did not survive as a single case.[38] Thus, the ICSID practice of single registration for multiple claimants is difficult—if not impossible—to replicate outside the organised institutional framework of ICSID.

Third, even if the registration hurdle is overcome and the multiple claims are successfully registered as a single case, that would not be the end of the matter as: the tribunal will have to revisit this question and make its own decision. As the tribunal in *CPC v Cambodia* explained, 'it is clear that the decision of the Secretary-General of ICSID to register a single arbitral proceeding does not bind [the]

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34 *Antaris GmbH and Dr Michael Göde v The Czech Republic* PCA Case No 2014-01 Award (2 May 2018) [16]–[17].

35 Investment Arbitration Reporter, "Solar Investors File Arbitration Against Czech Republic; Intra-EU BITs and Energy Charter Treaty at Center of Dispute", 15 May 2013. Although the proceedings in *Antaris* are confidential, the award has been made public in redacted form.

36 *Antaris* (n 34) [16].

37 ibid [17].

38 Only two of the original claimants continued with the case against the Czech Republic: Antaris GmbH and Dr Michael Göde.

Tribunal, which has to consider the jurisdictional arguments raised *de novo*'.[39] This consideration by itself may well justify the ICSID approach of registering multiple claims as single requests, on the basis that ICSID is doing no more than avoiding the mechanical or procedural problems of constitution of the tribunal, whilst preserving the substantive position on consent for consideration by the tribunal.

In sum, this brief survey lays bare a simple fact: that barring NAFTA, there is no legal framework in place to ensure a workable consolidation mechanism in investment arbitration. The solution is, in theory, straightforward, but the ICSID and UNCITRAL Rules—as well as any other relevant investment arbitration rules—ought to be amended to make provision for both consolidation and aggregation of claims, drawing inspiration from the examples of NAFTA and, in the realm of commercial arbitration, the ICC and the LCIA arbitration rules.[40]

Any meaningful solution should at a minimum be common to both the UNCITRAL and the ICSID arbitration rules. These are the rules most frequently offered as an option in investment treaties, and the rules most widely used in investment arbitration. If only one of these sets of rules were amended to make provisions for consolidation, claimants would be able to avoid the new consolidation rules through the simple expedient of using any of the other options available under the relevant investment treaty.

As of the publication of this essay, ICSID is well on its way to formally revising for the fourth time its arbitration rules—a project it has referred to as the most ambitious and 'most extensive review to date'.[41] On 28 February 2020, ICSID published its Working Paper 4 on the Proposals for Amendment of the ICSID Rules. This Working Paper includes a provision dealing with the issue of 'two or more pending arbitrations': Rule 46, entitled 'Consolidation or Coordination of Arbitrations'.[42] With consolidation, all aspects of the arbitration are joined, resulting in a single award. With coordination, only specific procedural aspects of the arbitration are joined, but the proceedings remain otherwise separate, resulting in a

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39 *CPC* (n 17) [119].

40 Article 10 of the 2017 ICC Arbitration Rules and Article 22.1(ix) and (x) of the 2014 LCIA Arbitration Rules.

41 See <https://icsid.worldbank.org/en/amendments> accessed 22 July 2020.

42 In the Introduction to Working Paper # 4, ICSID Secretary-General Meg Kinnear noted that 'the proposed amendments are ready to be attached to formal resolutions for a vote' and that the 'goal is to place the proposed amended rules before the membership for a vote in the latter half of 2020' [6]. If adopted, the new rules would be 'in place by early 2021' [6]. This shows just how advanced the process to revise the ICSID arbitration rules is.

separate award for each pending arbitration.[43] The proposed rule, however, does not address the problem identified in the previous paragraph: namely, that a claimant—or claimants—keen to avoid consolidation could do so by starting an arbitration under the ICSID Rules and another under one of the other options available under the relevant treaty—e.g. UNCITRAL.[44]

As for UNCITRAL, earlier efforts to amend the generic UNCITRAL arbitration rules to include provision for consolidation did not bear fruit. The Paulsson/Petrochilos report, prepared as an informal resource for UNCITRAL's process of amendment of the Rules conducted between 2006 and 2010, proposed a rule on consolidation.[45] That proposal was not pursued in the context of the generic rules on the ground of complexity. UNCITRAL has since been devoting considerable attention to the specific area of investment arbitration: first, with its work on transparency in treaty-based investor-State arbitration, which led to the adoption of the UNCITRAL Transparency Rules in 2013,[46] and to the negotiation of the Mauritius Convention on Transparency which was opened for signature and ratification in 2015;[47] and now with a comprehensive effort for the overall reform of the investor-State dispute settlement system.[48] Three aspects of that reform work are of direct relevance to the present discussion.

First, the question of the management of parallel proceedings is one of the specific areas which has been identified for further work and potential reform. This work, which is being carried out with the active participation of ICSID, may yet lead to an overall consolidation system straddling both ICSID and UNCITRAL of the type advocated above.

Secondly, short of such a consolidation mechanism (or more probably in addition to it) proposals have been made to prepare 'soft law' guidelines for parties

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43 ICSID Working Paper # 4, Proposals for Amendment of the ICSID Rules, 54. For the ICSID Additional Facility Rules, the proposed new rule on consolidation is Rule 56.

44 In ICSID, the practice of aggregation of claims—or *de facto* consolidation—has become an administrative practice and, as such, there seems to be no need to codify it, provided that it is consistent. It does not appear that ICSID intends to discontinue this practice under the new Rules.

45 Jan Paulsson and Georgios Petrochilos, 'Revision of the UNCITRAL Arbitration Rules' (September 2006) [125]–[127].

46 See <https://uncitral.un.org/en/texts/arbitration/contractualtexts/transparency> accessed 22 July 2020.

47 ibid.

48 ibid.

and tribunals, to codify the 'best practices' on the use of procedural measures to help them manage parallel proceedings. Examples of such procedural tools include orders for exchange of documents between the parallel proceedings, cooperation with document production, the holding of concurrent hearings, and formal stays pending the outcome of the other proceeding—be it the outcome of the case or of a particular issue.[49] These guidelines, which would be similar in nature to (say) the IBA Guidelines on the Taking of Evidence in International Arbitration or the IBA Guidelines on Conflicts of Interest in International Arbitration, both of which are widely used in investment arbitration, would have the aim of ensuring that, even if there is no consolidation of cases or aggregation of claims, the parallel proceedings are managed efficiently and, to the extent possible, resolved without any mutual inconsistencies.

For instance, with respect to the tool of stay of proceedings, the proposed guidelines could propose criteria for the granting of such a stay, including 'the sequence in which proceedings have been initiated, the possible outcome of other proceedings in relation to the current case, potential prejudice that may result from the stay of proceedings, the ability of the other forum to fulfil its judicial functions and the level of similarity required from the concurrent proceedings'.[50] The proposed 'soft law' guidelines on parallel proceedings would fulfil a dual role. First, they would help crystallise a consensus on the 'best practices' in the area of parallel proceedings. Second, they would facilitate the tasks of tribunals grappling with specific, knotty issues of parallel proceedings in the field of investment arbitration, sending a strong message to tribunals to take into account the systemic nature of investment arbitration in the discharge of their functions.

Thirdly, another possible reform option singled out for further work is the creation of a multilateral investment court which would—by its nature—resolve the questions posed in this essay through the case management of related proceedings brought before it. The reason is straightforward. In Section II of this essay, parallel proceedings were defined, for working purposes, as a scenario under which multiple investors, related or not, pursue claims in different fora against the same State for the same measure. With a standing multilateral court, the multiple investors would bring their claims before the same forum—the court itself—and thus the problematic scenario of parallel proceedings would simply not come into being in the first place. The multiple claims would be adjudicated before the same

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49 UNCITRAL, 'Concurrent proceedings in investment arbitration' Forty-eighth session (29 June–16 July 2015) A/CN.9/848 [19]–[22].

50 ibid [20].

forum, which would in particular be able to join or otherwise coordinate them through traditional court case management powers.[51]

C. Factors Relevant to Consolidation

Assuming that the disputing parties consent to consolidation and that there is a workable consolidation mechanism, the final question is whether consolidation is the right call. What are the factors relevant to a decision on whether to consolidate parallel proceedings? As this issue has been abundantly covered in the literature, it is only addressed here briefly. There are factors militating in favour of consolidation and factors militating against it.

First, the factors favouring consolidation are essentially two: (a) consistency—or rather the avoidance of inconsistent decisions—and (b) efficiency.

Of those two, the first is—as already noted—of particular importance in the field of investment arbitration. The concern was summarised thus by Katia Yannaca-Small:[52]

> [I]n the field of investment arbitration, where issues of public interest are at stake, though inconsistent decisions do not often occur, the risk that they may is a significant consideration. The result could be for a State to be exposed to two opposite decisions in regard to the same measure (as seen in the CMS and Lauder cases), which may undermine public acceptance of the adverse award.

As for efficiency, in terms of time and costs to the disputing parties, while it can be said on a very general level that consolidating cases involving common issues of fact and law should be expected to result in increased efficiency, the actual question of whether a consolidated proceeding on a concrete case will end up being more efficient than several proceedings is notoriously difficult to predict—to such a degree as to have invited comparisons with 'crystal-ball gazing'.

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[51] Insofar as related cases do not overlap temporally, one would expect that this multilateral investment court would be in a position to take cognizance of prior cases and of the determinations made therein in a way in which separate *ad hoc* tribunals have not been in a position to do.

[52] Katia Yannaca-Small, 'Parallel Proceedings' in P Muchlinski, F Ortino and C Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 1008, 1045.

As for factors against consolidation, those often cited are: (a) an absence of consent from one or more of the disputing parties; (b) confidentiality of the proceedings; and (c) due process concerns.

As for the first factor, this is an argument which should not arise if the regime providing for consolidation and *ex ante* consent has been properly conceived. The point is made cogently by the consolidation tribunal in the *Canfor* case in the following terms:[53]

> Claimants contest consolidation on the grounds that it would be against the consensual nature of arbitration (or the principle of party autonomy). However, the dispute settlement mechanism contained in […] Chapter 11 of the NAFTA is the result of an international treaty negotiated by three States. They provided for dispute settlement between them and investors by means of arbitration governed by international law. In doing so, the State Parties to the treaty are entitled as sovereigns to set certain conditions. In the case of the NAFTA, the States wished to ensure procedural economy in the case of multiple claims arising out of the same event or related to the same measure.

On a more basic level, as already noted, claimants under NAFTA are opting into the whole of the NAFTA regime, including consolidation, when submitting claims under this investment treaty.

As for the second factor—confidentiality—the *Canfor* consolidation tribunal, in its criticism of the decision of the *Corn Products* consolidation tribunal, was prescient in its assessment that 'the general trend in investor-State arbitration is transparency of process' and that 'within the perspective of that trend, the issue of confidentiality must be approached with caution'.[54] With the change to the ICSID Rules in 2006 and the new UNCITRAL Rules on Transparency, this is emerging as one of the most striking differences between commercial arbitration—where confidentiality remains the norm—and investment arbitration—where the paradigm has shifted towards transparency. As for the third factor, the possible due process concern alluded to is the so-called *Dutco* issue i.e. the need to guarantee an equality of rights for the parties in the appointment of the tribunal. The point can

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53 *Canfor* (n 12) [78].

54 ibid [139]; this comment was also intended as criticism of the decision of the *Corn Products* consolidation tribunal.

therefore be dealt with through an appropriate mechanism for independent constitution of the tribunal where necessary.[55]

When there are genuinely common questions of fact or law, it would normally be expected that the relevant factors should tip the balance in favour of consolidation in a number of cases. As already noted, the lack of consent remains the most serious general obstacle to consolidation, a difficulty which can only really be addressed by creating a clear framework providing for *ex ante* consent to consolidation.

IV. THE ORASCOM DECISION

We now turn to consider the decision in *Orascom v Algeria*.[56] The decision is significant for various reasons: (a) it represents a first in the context of parallel proceedings in investment arbitration; (b) the tribunal found that the claims were inadmissible because the parallel proceedings were deemed to be 'an abuse of the system'; and (c) it based that finding on the principle of abuse of rights—and of abuse of the system—in circumstances where multiple claimants with related economic interests had brought parallel claims against the same host State for the same measures.

The question of the possible application of a doctrine of abuse of rights in the context of 'vertical claims' in investment arbitration had been the subject of

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55 After the French *Cour de Cassation*'s decision in *Siemens AG and BKMI Industrienlagen GmbH v Dutco Consortium Construction Company Ltd.*, 1er Civ., 7 January 1992, pourvoi No. 89-18.726, Bull 1992, I, No. 2. In this case, Dutco brought claims against Siemens and BKMI, relating to a construction project in Oman, in a single ICC arbitration. Each respondent wished to appoint an arbitrator, arguing that there were two separate disputes. The ICC warned the respondents that, if they failed to agree on a joint nomination, it would appoint an arbitrator on their behalf, as was its long-standing practice at the time. Siemens finally agreed, under protest, to appoint the arbitrator BKMI proposed. When the ensuing award was challenged, the *Cour de Cassation* declared that this practice was invalid, for it was inconsistent with the principle of equality between the parties in the appointment of arbitrators. As a result of *Dutco*, the ICC revised its arbitration rules and its practice on the appointment of arbitrators in multi-party scenarios: its arbitration rules now provide that where there are either multiple claimants or multiple respondents, they shall agree on a joint nomination, or else the ICC will itself appoint an arbitrator (2017 ICC Arbitration Rules, Article 12(6)). Therefore, the post-*Dutco* ICC rules contain a clear *ex ante* consent to appointment by the ICC in multi-party situations which applies equally to both claimants and respondents.

56 *Orascom TMT Investments S.à.r.l. v People's Democratic Republic of Algeria* (*Orascom*) ICSID Case No ARB/12/35 Award (31 May 2017).

academic debate for some time, perhaps most notably at a colloquium organised by the International Arbitration Institute (IAI) in Paris on 22 November 2013.[57] The colloquium's organisers—Gabrielle Kaufmann-Kohler and Emmanuel Gaillard—would go on to become protagonists in the *Orascom* matter.[58]

The idea was taken up by the *Orascom* tribunal and the essential portion of the decision is at paragraphs 539-548. The *Orascom* tribunal concluded as follows:[59]

> [A]s explained by [the Claimant's witness], the Claimant first caused one of its subsidiaries, OTH, to bring claims against Algeria. Then, it caused a different subsidiary in the chain, Weather Investments, to threaten to bring a different arbitration in relation to the same dispute. Finally – after selling the investment – it pursued yet another investment treaty proceeding in its own name for the same investment (its past shareholding in OTA) in relation to the same host state measures and the same harm. Doing so, the Claimant availed itself of the existence of various treaties at different levels of the vertical corporate chain using its rights to treaty arbitration and substantive protection in a manner that conflicts with the purposes of such rights and of investment treaties. For the Tribunal, this conduct must be viewed as an abuse of the system of investment protection, which constitutes a […] ground for the inadmissibility of the Claimant's claims and precludes the Tribunal from exercising its jurisdiction over this dispute.

In declaring the claims inadmissible, the *Orascom* tribunal examined the case before it within the larger context of the related parallel proceedings. It took into account not just the ongoing parallel proceedings, but even the threat 'to bring a different arbitration in relation to the same dispute'.[60] In short, the tribunal adopted a systemic view, by not looking at the case in isolation but looking at it as a part of a whole factual matrix.

The *Orascom* tribunal went on to expressly distinguish its decision from the *Lauder* and *CMS* decisions on the basis that, in those cases, the Czech Republic had repeatedly refused to consolidate the claims—which was the main obstacle to

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57 The IAI colloquium was entitled 'Concurrent Proceedings in Investment Disputes: Treaty Arbitrations Brought by Shareholders'.

58 See (n 5).

59 *Orascom* (n 56) [545].

60 ibid.

consolidation, as explained above. On the application of the principle of abuse of rights, the tribunal added:[61]

> [I]t cannot be denied that in the fifteen years that have followed those cases, the investment treaty jurisprudence has evolved, including on the application of the principle of abuse of rights (or abuse of process), as was recalled above. The resort to such principle has allowed tribunals to apply investment treaties in such a manner as to avoid consequences unforeseen by their drafters and at odds with the very purposes underlying the conclusion of those treaties.

Inevitably, even if one adopts the theoretical basis underpinning the *Orascom* decision (the application of a doctrine of abuse of rights to regulate parallel proceedings), the application of such a doctrine will turn heavily on the relevant facts.[62] It is thus inevitable that some questions remain open. Questions about timing: At what point do the parallel proceedings become abusive? Is it with the mere filing of the request for arbitration? Or is it necessary to wait for the tribunal to uphold jurisdiction? Question about identity:[63] What is the degree to which the various claimants must be affiliated? In *Eskosol v Italy*[64] no abuse of process was found even though Eskosol's 80% shareholder—Blusun[65]—had already filed claims against Italy.[66] Questions about motivation: Does it make a difference whether the parallel proceedings are brought to maximise the chances of success on the merits or the amount of compensation, or whether they are merely brought to secure a forum for the resolution of the dispute? Finally, questions about a possible right to cure: Would it be possible to cure an abuse of process? For instance, by voluntarily staying or withdrawing the parallel proceedings?

Future investment tribunals will grapple with these questions and with the persuasive value and scope of the *Orascom* decision. For now, whether or not one

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61 ibid [547].

62 '[T]he Tribunal's conclusions […] are the result of the peculiar facts of the case': (a) the claimants were all part of the same vertical corporate chain; (b) the same shareholder controlled the entities in the chain; (c) the claims are directed against the same State measure; and (d) the economic damage was the same (*Orascom* (n 56) [546]).

63 Ricky Diwan QC, from Essex Court Chambers, has helpfully distilled questions about timing and identity at the 30th annual meeting of the Institute for Transnational Arbitration, in Dallas, Texas, on 20–22 June 2018.

64 *Eskosol S.p.A. in liquidazione v Italian Republic* ICSID Case No ARB/15/50.

65 *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v Italian Republic* ICSID Case No ARB/14/3 Award (27 December 2016).

66 *Eskosol S.p.A. in liquidazione v Italian Republic* ICSID Case No ARB/15/50.

agrees with its outcome, the decision can be seen as providing another possible avenue to resolve the thorny issue of parallel proceedings in certain factual situations. The *Orascom* tribunal focused on the systemic repercussions of the case and rooted its decision in the principle of abuse of rights, seen by the tribunal as an expression of the wider international law principle of good faith.

V. CONCLUSION

Investment arbitration is one of the most vibrant and rapidly developing fields of international law. Yet progress is required in a number of areas. This essay has identified the question of parallel proceedings as one where the need for improvement is high. Parallel proceedings have the potential to waste resources, increase costs, raise unnecessary multiple-recovery questions, produce inconsistent results, and undermine confidence in the system of investment arbitration from users and the public alike. This shows just how vital and pressing the need for reform in this important area is.

The essay first looked at the question of consolidation of parallel proceedings—the traditional solution to the problem—where the salient issues are consent to consolidation and the need for a workable consolidation mechanism. The relevant factors for consolidation were briefly surveyed. The essay concluded with a brief analysis of the novel possible solution proposed by the *Orascom* tribunal. Along the way, a number of proposals were made, noting that those are now being actively considered within UNCITRAL's Working Group III. There is reason to be cautiously optimistic: improvements on this front can be expected once the task of the Working Group will have come to an end, though this is unlikely to happen in the immediate future.

First, consent to consolidation should be provided *ex ante*—either in the arbitration clause or in the institutional rules. Second, the leading investment arbitration rules—at a minimum ICSID and UNCITRAL—could be amended to enact coordinated provisions on both consolidation and aggregation of claims. Third, 'soft law' guidelines on how to manage parallel proceedings could be issued under the aegis of a globally recognised institution, like UNCITRAL. Finally, the wider systemic reform advocated by a number of States, calling for the creation of a multilateral investment court, would—if adopted and by its nature—largely resolve the issue through the case management of related proceedings brought before that very court.